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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSIE RAMIREZ,

Defendant and Appellant.

B217435

(Los Angeles County
Super. Ct. No. BA328826)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles F. Palmer, Judge. Affirmed.

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, David C. Cook and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Jessie Ramirez, appeals from his conviction for custodial possession of a sharp instrument which could be used as a stabbing weapon. (Pen. Code, § 4502, subd. (a).) Defendant admitted that he was previously convicted of two serious felonies. (§§ 667, subd. (b)-(i); 1170.12.) Defendant argues that the trial court improperly commented regarding a prosecution exhibit and denied his new trial motion. Defendant further argues that he was not properly advised of his constitutional rights regarding his waiver of a court trial related to his prior serious felony allegations and his sentence constitutes cruel and unusual punishment.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) At approximately 5:50 p.m. on May 22, 2007, Los Angeles County Sheriff's Deputy Ryan Hafner and another deputy identified only as "Deputy Strong" were working in a county jail. Vance Kevin Roque was working as a Los Angeles County Sheriff's custody assistant at the twin towers jail on May 22, 2007. Mr. Roque was assigned to the observation post while other sheriff's deputies were searching the inmates in the outdoor recreation area. Defendant was one of the inmates being searched. Deputies Hafner and Strong were using a metal detector wand during strip searches. Defendant removed his clothing. Thereafter, the deputies inspected his body while he shook out his hair, lifted his feet, and wiggled his fingers and toes. Defendant then was instructed to bend at the waist and cough. Defendant was ordered to separate his buttock cheeks for further visual inspection. Nothing was visually detected on or in defendant's body. After defendant dressed, Deputy Strong used a metal detector wand over defendant's abdomen and rectal area. The metal detector wand sounded. Defendant was placed in handcuffs for safety purposes.

Mr. Roque was asked to open the door to the visiting room as Deputies Hafner and Strong brought defendant inside. Defendant was then handcuffed to a metal stool. Deputies Hafner and Strong returned to the recreation area. From a glass booth, Mr. Roque saw defendant bend down. Defendant reached his hand into the waistband of his pants. Defendant moved his hand into his anus and began grunting. Mr. Roque notified Deputies Strong and Hafner over the intercom. Deputies Strong and Hafner immediately went to the visiting room. As this was occurring, defendant pulled a white sock from his anus. Deputies Strong and Hafner saw the sock in defendant's hand as they arrived in the visiting area. Defendant threw the sock toward the outside of the visiting room.

The deputies unrolled the dirty sock. Inside the sock, they found a three-inch black piece of metal, which was sharpened at one end and had cloth wrapped around the other end like a handle. Based upon his experience and the manner in which the metal was sharpened and wrapped, Deputy Hafner believed that the instrument could be used as a "shank" for stabbing. After the sharp instrument was recovered, Deputy Hafner noticed that defendant's pants were soaked with urine and there was a feces smell in the area.

III. DISCUSSION

A. The Trial Court's Comments Regarding the Sharp Instrument

1. Factual and procedural background

Defendant argues that the trial court improperly commented on the nature of the instrument in evidence as exhibit No. 1. Defendant further argues the comments served to violate his state and federal constitutional rights to due process. During jury instructions, the trial court stated: "During the trial, several items - - actually, one item was received into evidence as an exhibit. You may examine the exhibit if you think it will help you in your deliberations. The exhibit will be sent into the jury room with you

when you begin to deliberate.” After the instructions were given, the trial court held a sidebar conference. The trial court inquired: “[W]hat are your thoughts on whether or not the shank should be - - in Exhibit 1 should go into the jury room? I think my inclination is to tell them if they want to see it, the bailiff would bring it in.” The prosecutor asked, “The bailiff maintains control over it, right?” The trial court answered, “Yes.” Defense counsel responded, “That’s okay with me.”

Immediately thereafter, the trial court further instructed the jury: “I want to make one correction with respect to the exhibit. It will not go into the jury room unless you ask to see it and in which case the bailiff will bring it back for you. One of our concerns is whenever we have an item, whether it be a potential weapon, or even not, that is sharp, we don’t want to run the risk that any jurors are going to inadvertently stick themselves with it. So you may ask to see it and it will be brought to you by the bailiff if you do wish to see it.”

2. Forfeiture

As set forth above, the trial court explained its intentions regarding the exhibit and both the prosecutor and defense counsel agreed that the bailiff should retain control of the instrument. When the trial court gave the further instruction, defense counsel did not object. Defendant’s failure to object to this instruction at trial forfeits the issue on appeal. (*People v. Bolin* (1998) 18 Cal.4th 297, 326; *People v. Jennings* (1991) 53 Cal.3d 334, 374; see also *People v. Stone* (2008) 160 Cal.App.4th 323, 331.)

3. The trial court could properly instruct as it did on exhibit No. 1

Notwithstanding that forfeiture, the trial court could properly instruct the jury regarding the safety issues of having a “sharp” instrument in the jury room. Defendant argues that the trial court’s statement regarding the sharpness of the instrument removed one of the factual elements of the charge from the jurors’ consideration. Defendant

argues, “[T]he trial court told the jury in effect that the shank was so sharp that it was concerned that the jurors might inadvertently stick themselves with it (and injure themselves), just by examining it.” We disagree.

Section 4502, subdivision (a) provides in part, “Every person who, while at or confined in any penal institution . . . possesses or carries upon his or her person . . . any . . . sharp instrument . . . is guilty of a felony” Article VI, section 10 of the California Constitution states, “The court may make any comment on the evidence . . . as in its opinion is necessary for the proper determination of the cause.” (See *People v. Sturm* (2006) 37 Cal.4th 1218, 1236; *People v. Rodriguez* (1986) 42 Cal.3d 730, 766; *People v. Moore* (1974) 40 Cal.App.3d 56, 66.) In *People v. Rodriguez*, *supra*, 42 Cal.3d at page 768, our Supreme Court held that the trial court’s comments “must be accurate, temperate, nonargumentative, and scrupulously fair.” The *Rodriguez* court further held, “[W]e have made clear that the trial court has broad latitude in fair commentary, so long as it does not effectively control the verdict.” (*Ibid.*)

In this case, the trial court’s succinct statement regarding exhibit No. 1 directly related to the safety precautions routinely taken by courts when any exhibit could be dangerous to those handling it. The trial court’s reference to the instrument as “sharp” was merely to explain the cautionary step of having the bailiff take charge of the item. The trial court was careful to state, “whether it be a potential weapon, or even not” to avoid calling it a weapon. The statement was made to correct the jury instruction that indicated the jurors would have the exhibit in the jury room.

In addition, the trial court instructed the jurors, “Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.” This cautionary instruction came just prior to the cautionary comment. The California Supreme Court has consistently held that on appeal: “““Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case.”” [Citation.]” (*People v. Carey* (2007) 41 Cal.4th 109, 130, quoting *People v. Lewis* (2001) 26 Cal.4th 334, 390; *People v. Yeoman* (2003) 31 Cal.4th 93, 139; see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803.) Moreover, the

jurors had seen the instrument during trial and had the ability to request to see it again during deliberations. We have viewed the shank. It is readily apparent that the instrument has a sharp narrow point at the end of the black metal portion. A reasonable juror could reasonably determine that the instrument was sharp just by viewing it.

4. Harmless error

Any error in the trial court's statement about the sharpness of the exhibit was harmless under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Carpenter* (1997) 15 Cal.4th 312, 402.) Deputy Hafner testified there was a three-inch black piece of metal, which was sharpened at one end inside the sock that defendant tossed aside. Deputy Hafner also stated that based upon the manner the metal was sharpened and wrapped, he believed that the instrument could be used as a "shank" for stabbing. Defense counsel did not challenge the nature of the instrument during the trial or closing argument. Rather, defense counsel argued that the deputies did not adequately document or test the nature of the sock or defendant's clothing and hands. Defense counsel also argued that the other individual in the visiting room could not be excluded as a source of the instrument. As a result, the sharpness of the instrument was not challenged and any reference to it was harmless.

B. Denial of New Trial Motion

1. Factual and procedural background

Defendant argues that the trial court improperly denied his new trial motion based upon juror misconduct. Defendant further argues his federal and state constitutional rights to a trial by a fair and impartial jury were violated. Jury deliberations commenced at 11:50 p.m. on June 9, 2008. At 2:30 p.m., the jury requested a portion of Mr. Roque's testimony be reread. All counsel agreed to have a reporter give the readback in the

deliberation room. At 3:10 p.m., the jury notified the trial court that they had reached a verdict. Defendant was found guilty. The jurors were polled. All of the jurors affirmatively indicated that it was their verdict.

On June 13, 2008, the trial court notified counsel that a juror, Ann Marie Ramon, had contacted the court indicating that during the deliberations the jurors discussed the potential penalty or punishment. Ms. Ramon also expressed some concern about balloting. Ms. Ramon was in the hallway at the time. The trial court indicated a willingness to make Ms. Ramon available to the parties' investigators. Ms. Ramon was brought into the courtroom. The trial court informed Ms. Ramon that she had the right not to speak to anyone. Ms. Ramon said she was willing to speak with the attorneys or their investigators and to have her telephone number disclosed to them.

On August 14, 2008, defense counsel filed a new trial motion pursuant to section 1181. The motion included a declaration from Ms. Ramon. Ms. Ramon stated that during deliberations the jurors agreed to write their votes on pieces of paper and place them into a clear plastic cup. The jury foreperson would then read the votes aloud. Some of the pieces of paper used for voting were green and a few were white. After two rounds of voting, the jury could not reach a decision. Ms. Ramon requested a portion of the transcript be reread. Ms. Ramon asked the foreperson a "couple of times" to request the testimony be reread. While they were waiting for the testimony to be reread, the foreperson asked each juror to state what would change their mind. Not all of the jurors disclosed how they voted. However, after each had spoken, the foreperson said she believed defendant was guilty. Ms. Ramon believed that as a result of the verbal opinions she felt "undue pressure was placed on the persons who" believed defendant was innocent. Juror No. 3 stated that defendant was already in jail and, "What's two to three more months?" Ms. Ramon believed this was inappropriate because the jurors had been instructed not to consider punishment.

Thereafter, another paper ballot was taken. The guilty verdict was then unanimous. Although the read back had not yet occurred, the foreperson notified the bailiff that a verdict had been reached. Ms. Ramon had believed that this was not a final

vote. However, the jurors were summoned to the courtroom where the verdict was read. Each juror was polled. When the jurors returned to the jury room, one of the jurors said, “Did you hear them say this is a felony?” Ms. Ramon told Juror No. 3, “You said this would only be two to three more months.” Juror No. 3 responded that she did not know. Ms. Ramon told Juror No. 3, “Do you see why we weren’t supposed to discuss the sentence?” Ms. Ramon felt that Juror No. 3’s comment about a few more months “may have influenced” her decision to vote for guilty.

The opposition to the new trial motion included a report from the prosecutor’s investigator. The investigator interviewed Ms. Ramon by telephone. Ms. Ramon repeated the statement made by Juror No. 3, “The defendant is already in jail, what’s another two or three months?” Ms. Ramon stated that she believed the remark was inappropriate because jury instructions prohibited punishment discussions. However, Ms. Ramon explained, “[T]he remark did not affect [her] decision relative to the guilt or innocence of the defendant, rather [she] believed it may have tainted the fairness of the process.” No objection was interposed by defense counsel regarding the fact that nothing in the investigator’s report was reflected in a declaration.

On October 23, 2008, defense counsel filed a petition for an order disclosing personal juror identification information. The prosecutor requested time to respond to the petition. On November 7, 2008, the trial court set December 9, 2008, for a hearing on the petition. Counsel were directed to jointly draft a letter to the jurors advising them of their rights pursuant to Code of Civil Procedure section 237. On December 9, 2008, the trial court noted that although the letter to the jurors had been prepared, it had not yet been sent out. On December 29, 2008, the trial court noted that six jurors had opposed the release of their identifying information and were unwilling to speak with the attorneys or their representatives. Juror No. 1 was willing to speak with the attorneys or their representatives but did not want her personal information disclosed. The trial court authorized counsel or their investigators to contact the remaining five jurors who had not responded, but limited that contact to willing participants, “If any juror indicates a desire not to speak or indicates they do not wish to speak to the investigator or attorney, that

those wishes will be respected and that means there will be no further questioning of that juror.”

On February 9, 2009, defense counsel reported defendant’s investigator, who had left the court panel, had not attempted to interview the five jurors. Defense counsel requested additional time to conduct the interviews. The trial court continued the matter to allow him to do so. After several continuances, on June 10, 2009, defense counsel reported that he had no additional information from other jurors. Defense counsel proceeded with his original new trial motion based upon juror misconduct.

The trial court ruled that the jurors’ consideration of punishment constituted misconduct but found it was nonprejudicial. The trial court relied on a whole series of juror misconduct opinions. The trial court engaged in a lengthy analysis of the facts in this case and compared the circumstances to those in *People v. Hill* (1992) 3 Cal.App.4th 16, 37, overruled on another point in *People v. Nesler* (1997) 16 Cal.4th 561, 582 [plur. opn. of George, C. J.]. The trial court found: “[T]he . . . allusions to improper manner were isolated and infrequent. There is no evidence of a multilateral discussion of penalty nor competent evidence that penalty was considered. . . . [T]here is no evidence that any juror in this case voted guilty because of the statements regarding penalty or punishment. [Ms. Ramon’s] declaration asserts only that the statement, quote, may have influenced my vote to guilty, closed quote.” The trial court ruled: “Given the statement in [Ms. Ramon’s] declaration, the factual legal issues considered by the jurors in reaching their verdict, the source of the statement, and the other factors previously discussed, the court does not find a substantial likelihood that one or more jurors were influenced by the single statement by a juror that, quote, the defendant was already in jail, what’s two or three more months, closed quote. [¶] Regarding the statements made in [Ms. Ramon’s] declaration concerning the process by which the jurors reached - - excuse me, concerning the process by which the jury reached its verdict, the court finds no evidence of juror coercion or other misconduct sufficient to have presented a fair and due consideration of the case. There is no indication jurors were prevented from stating their views or subject

to any pressure whatsoever, each juror was polled individually and asked, quote, is this your verdict, closed quote, and responded in the affirmative without qualification.”

2. The trial court could reasonably deny defendant’s new trial motion

A person accused of a crime has a constitutional right to a trial by a fair and impartial jury. (U.S. Const., amends. VI and XIV; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hamilton* (1999) 20 Cal.4th 273, 293-294; *In re Hitchings* (1993) 6 Cal.4th 97, 110; *People v. Duran* (1996) 50 Cal.App.4th 103, 111.) Our Supreme Court has held: “An impartial jury is one in which no member has been improperly influenced [citations] and every member is “capable and willing to decide the case solely on the evidence before it” [citations].” (*In re Hamilton, supra*, 20 Cal.4th at p. 294.) “Misconduct by a juror, or a nonjuror’s tampering contact or communication with a sitting juror, usually raises a rebuttable “presumption” of prejudice. [Citations.]’ [Citation.]” (*People v. Danks* (2004) 32 Cal.4th 269, 302, quoting *In re Hamilton, supra*, 20 Cal.4th at p. 295; see also *People v. Ramos* (2004) 34 Cal.4th 494, 519.)

In *Hamilton*, our Supreme Court continued: “[W]ith narrow exceptions, evidence that the internal thought processes of one or more jurors were biased is not admissible to impeach a verdict. The jury’s impartiality may be challenged by evidence of ‘statements made, or conduct, conditions, or *events* occurring, either within or without the jury room, of such a character as is *likely* to have influenced the verdict improperly,’ but ‘[n]o evidence is admissible to show the [*actual*] effect of such statement, conduct, condition, or event upon a juror . . . or concerning the *mental processes* by which [the verdict] was determined.’ (Evid. Code, § 1150, subd. (a),¹] italics added; see *People v. Hutchinson*

¹ Evidence Code section 1150, subdivision (a) provides: “Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror

(1969) 71 Cal.2d 342, 349-350.) Thus, where a verdict is attacked for juror taint, the focus is on whether there is any *overt* event or circumstance, ‘open to [corroboration by] sight, hearing, and the other senses’ [citation], which suggests a *likelihood* that one or more members of the jury were influenced by improper bias.” (*In re Hamilton, supra*, 20 Cal.4th at p. 294, original italics; see also *People v. Steele* (2002) 27 Cal.4th 1230, 1261.)

Our Supreme Court has held: “When the motion is based upon juror misconduct, the reviewing court should accept the trial court’s factual findings and credibility determinations if they are supported by substantial evidence, but must exercise its independent judgment to determine whether any misconduct was prejudicial. [Citation.]” (*People v. Dykes* (2009) 46 Cal.4th 731, 809; *People v. Tafoya* (2007) 42 Cal.4th 147, 192; see also *People v. Ault* (2004) 33 Cal.4th 1250, 1263-1265.) “[A] defendant may establish bias if (1) the extraneous material, judged objectively, ‘is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror,’ [citation] or (2) from the nature of the misconduct and surrounding circumstances, it is substantially likely a juror ‘was “actually biased”’ against the defendant. [Citation.]” Because it is impossible to shield jurors from every contact that may influence their vote, courts tolerate some imperfection short of actual bias.” (*People v. Ramos, supra*, 34 Cal.4th at p. 519, quoting *In re Hamilton, supra*, 20 Cal.4th at p. 296; *People v. Danks, supra*, 32 Cal.4th at p. 303.) Under the second test, “[a]ll pertinent portions of the entire record, including the trial record, must be considered. “The presumption of prejudice may be rebutted, inter alia, by a reviewing court’s determination, *upon examining the entire record*, that there is no substantial likelihood that the complaining party suffered actual” bias. [Citation.]” (*People v. Danks, supra*, 32 Cal.4th at p. 303, quoting *In re Carpenter* (1995) 9 Cal.4th 634, 654; see also *People v. Stewart* (2004) 33 Cal.4th 425, 510; *People v. Mendoza* (2000) 24 Cal.4th 130, 196.)

Here, the trial court found a juror had committed misconduct by making reference to the potential minimal additional punishment defendant would receive as the result of a

either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.”

conviction. The jurors had been instructed not to consider penalty or punishment. However, the trial court found the misconduct was not prejudicial. As in the case of *People v. Hill, supra*, 3 Cal.App.4th at pages 37-38, the reference to penalty involved a matter not material to the issues presented to the jury. As the trial court noted, the reference to the penalty was isolated and infrequent. Moreover, there was no evidence of “a multilateral discussion of penalty” nor competent evidence of other than brief mention of the time defendant had been incarcerated. In addition, the trial court noted: “[T]he source of the extrajudicial information was neither represented nor perceived, quote, as being specially informed or knowledgeable on the subject of punishment for crime. The source was simply another juror with no particular claim or knowledge of the subject.” The trial court carefully analyzed the inappropriate comments and ultimately concluded no prejudice resulted. The trial court could properly exercise its broad discretion to deny the new trial motion.

Defendant’s further argument that Juror No. 3’s statement regarding penalty improperly influenced Ms. Ramon to vote for guilt is meritless. Ms. Ramon’s internal thought processes may not be considered in evaluating the juror misconduct issues under these circumstances. (See *People v. Dykes, supra*, 46 Cal.4th at p. 812; *People v. Riel* (2000) 22 Cal.4th 1153, 1219.) No abuse of discretion occurred.

C. Defendant’s Prior Serious Felony Convictions Admissions

1. Factual and procedural background

Defendant argues that his waiver of a jury trial on the issue of his prior serious felony convictions was not voluntary and intelligent. Following return of the guilty verdict, the trial court inquired whether defendant would waive his right to a jury trial on the prior felony conviction allegations. Defendant initially indicated he wanted the jury to decide the prior conviction issues. The trial court stated, “[Defense counsel], you’ve indicated that your client may be willing to waive jury trial?” Defense counsel indicated:

“Right, because I advised my client there’s no issue of identity any longer with regard to the priors. This court makes that decision anyway. It really now is only a question of whether or not they have the proper documentation to show that he was, in fact, the individual which the court decides that’s in the priors and the priors, in fact, that are bought [sic] forth have the proof, the necessary certification from the prison system. So my understanding is that [defendant] after discussion with me is willing to waive that at the present time.”

The prosecutor, Guillermo R. Santiso, addressed defendant: “At a priors trial what I would do is I would bring in a worker from the [district attorney]’s office who would testify as to your prison packet. And the prison packet, what it has in it is the abstract of judgments, has your fingerprints, and also has a photograph of you.” Defense counsel interrupted: “Just so we understand, I explained to him we’re going to have a court trial on this issue[.]. What we’re talking about is a waiver of the jury on theses issues. . . . [¶] I don’t know if we need to go through what they’re going to bring in. We’re still going to have a court trial on this same procedure.” Mr. Santiso explained, “I just want to be as detailed as possible.” Mr. Santiso then explained an employee of the prosecutor’s office would testify regarding the prison packet. The prosecutor again said, “You’re entitled to have the jury hear that evidence, the jury that was just seated before you.” The prosecutor then read the details related to defendant’s prior felony convictions. The prosecutor inquired, “Do you waive your right to a jury trial and you’re going to allow the court [to] make the determination as to whether those crimes were, in fact, committed by you?” Defendant responded, “Yeah.” Thereafter, the trial court stated: “Just so we’re clear, on the alleged prior convictions that [the prosecutor] just read, are you waiving your right to a jury trial and instead having a court trial in which the judge, that is me, will determine whether or not those priors have been proven?” Defendant said: “Yeah. Yeah.” Following the trial court’s denial of the new trial motion, defense counsel stated defendant wished to admit the prior conviction allegations rather than have a court trial. As the prosecutor recited the facts as to each prior offense, defendant admitted the truth

of each allegation. Defendant was not advised of his self-incrimination and witness cross-examination rights.

2. Defendant's prior serious felony admissions were valid

An accused entering a guilty plea or admission to a special allegation, is entitled to be informed of the following constitutional rights: the right to a jury trial; the right to confront and cross-examine witness; and the privilege against self-incrimination. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243, fn. 5; *In re Yurko* (1974) 10 Cal.3d 857, 863; *In re Tahl* (1969) 1 Cal.3d 122, 132, overruled on a different point in *Mills v. Municipal Court For San Diego Judicial Dist.* (1973) 10 Cal.3d 288, 307-308.) Our Supreme Court clarified: “[T]he standard for determining the validity of a guilty plea ‘was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’ [Citations.] ‘The new element added in *Boykin*’ was not a requirement of explicit admonitions and waivers but rather ‘the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily.’ [Citation.] . . . ‘*Boykin* does not require specific articulation of each of the three rights waived by the guilty plea, as long as it is clear from the record that the plea was voluntary and intelligent’ [Citation.] There is wide agreement both on this point and on the applicable test: The record must affirmatively demonstrate that the plea was voluntary and intelligent under the totality of the circumstances. [Citations.]” (*People v. Howard* (1992) 1 Cal.4th 1132, 1177-1178, quoting *North Carolina v. Alford* (1971) 400 U.S. 25, 31, and *United States v. Pricepaul* (9th Cir. 1976) 540 F.2d 417, 424-425.)

In *People v. Mosby* (2004) 33 Cal.4th 353, 361-364, our Supreme Court reviewed the cases that followed *Howard* and distinguished them from facts similar to those in this case. In *Mosby*, immediately after the jury found the defendant guilty, he was informed of his right to a jury trial on the prior allegation. The trial court did not advise him of his right to remain silent and to confront witnesses. Our Supreme Court noted: “[U]nlike a

trial on a criminal charge, trial on a prior conviction is ‘simple and straightforward,’ often involving only a presentation by the prosecution ‘of a certified copy of the prior conviction along with the defendant’s photograph [or] fingerprints’ and no defense evidence at all. [Citation.]” In *Mosby*, our Supreme Court noted that the defendant was represented by counsel and had just undergone a jury trial. In *Mosby* our Supreme Court concluded: “Thus, he not only would have known of, but had just exercised, his right to remain silent at trial, forcing the prosecution to prove he had sold cocaine. And, because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation.” (*People v. Mosby, supra*, 33 Cal.4th at p. 364.) In *Mosby* our Supreme Court further looked to the entire record. Defendant’s prior conviction was based on a guilty plea where he would have received the *Boykin* and *Tahl* advisements. (*Id.* at p. 365.) Based upon the totality of the circumstances, our Supreme Court held that the defendant had voluntarily and intelligently admitted the truth of the prior conviction allegations despite the fact that he had only been advised of and waived his right to a jury trial on that issue. (*Ibid.*; see also *People v. Hinton* (2006) 37 Cal.4th 839, 874; *People v. Allen* (1999) 21 Cal.4th 424, 438; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 547 [“the appropriate inquiry to determine if a plea was valid is whether the record affirmatively shows it was “voluntary and intelligent under the totality of the circumstances” . . .”].)

Here, defendant was aware of his right to decline to testify. Defense counsel had so advised the jury during voir dire. The jury instructions also included a statement that defendant need not testify. As noted previously, defendant waived his jury trial right after a thorough explanation of the process.

The totality of the circumstances surrounding defendant’s admissions in this case support the conclusion his waiver was voluntary and intelligent despite the fact that the specific admonishments regarding self-incrimination and confrontation of witnesses were not given. Both the prosecutor and defense counsel had explained the procedures that would take place at a jury trial, including the mode of presentation of evidence. Defendant had been subject to a jury trial on the custodial weapon possession guilt

proceedings during which he declined to testify. Defendant had the opportunity to observe how evidence was presented through witness testimony and how that testimony was subjected to cross-examination.

Moreover, defendant did not raise any objection regarding the consequences of his admissions. As will be set forth below, failure to object to a sentencing issue at the time it is imposed constitutes forfeiture of the issue on appeal. In any event, as our colleagues in the Court of Appeal for the First Appellate District held: “[U]nlike the admonition required for a waiver of constitutional rights, advisement of the penal consequences of admitting a prior conviction is not constitutionally mandated. Rather, it is a judicially declared rule of criminal procedure.” (*People v. Wrice* (1995) 38 Cal.App.4th 767, 770; see *In re Yurko, supra*, 10 Cal.3d 857; *People v. Jones* (2009) 178 Cal.App.4th 853, 858; *People v. Wright* (1987) 43 Cal.3d 487, 494-495.) As a result, if the only error is the failure to advise a defendant of the penal consequences of his admissions, the error is forfeited if not raised at or before sentencing. (*People v. Jones, supra*, 178 Cal.App.4th at p. 858-859; *People v. Walker* (1991) 54 Cal.3d 1013, 1023.) Finally, defendant’s criminal history and experience within the criminal justice system, which is set forth in detail below, and his apparent impatience at the time of the jury trial waiver and admissions indicate he was well aware of the consequences of his decisions.

D. Sentencing

Defendant argues that his sentence is so grossly disproportionate as to violate the United States and California Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art I, § 17.) More specifically, defendant argues that the 25-year-to-life sentence constitutes cruel and unusual punishment. Preliminarily, defendant’s failure to object on these grounds in the trial court constitutes a waiver of the issue on appeal. In the case of *In re Seaton* (2004) 34 Cal.4th 193, 197-198, our Supreme Court held: “Penal Code section 1259 provides: ‘Upon an appeal taken by the defendant, the appellate court may . . . review any question of law involved in any ruling, order, instruction, or thing whatsoever

said or done at the trial or prior to or after judgment, which thing was said or done *after objection made in and considered by the lower court*, and which affected the substantial rights of the defendant.’ (Italics added.) Thus, as a general rule, ‘the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.’ [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights. [Citations.]” (*Ibid.*; *People v. Barnum* (2003) 29 Cal.4th 1210, 1224, fn. 2; *People v. Saunders* (1993) 5 Cal.4th 580, 590.) A defendant’s failure to object to a sentencing decision is not a jurisdictional error. (*People v. Scott* (1994) 9 Cal.4th 331, 355 [defendant’s claim that reasons used for sentencing were “inapplicable, duplicative, and improperly weighed” was waived]; *People v. de Soto* (1997) 54 Cal.App.4th 1, 7-8 [improper dual use of facts underlying weapons use to impose the upper term waived by failure to impose a more specific objection at sentencing]; *People v. Kelley* (1997) 52 Cal.App.4th 568, 581-582 [failure to consider mitigating factors]; *People v. Middleton* (1997) 52 Cal.App.4th 19, 36-38 [defendant cannot object to enhancement for first time on appeal] overruled on another point in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752, fn. 3.) Defendant’s cruel or unusual punishment contention has been forfeited.

Even if this issue were preserved, the trial court could properly impose the 25-year-to-life sentence in compliance with state and federal law. Defendant was sentenced in accordance with section 667, subdivision (e)(2)(A)(ii). As a result, defendant was subject to a 25-year indeterminate term. In the case of *In re Coley* (2010) 187 Cal.App.4th 138, 147, we noted the holding in *Solem v. Helm* (1983) 463 U.S. 277, 296-303, upon which defendant relies, is limited to those instances where a defendant is sentenced to life in prison without the possibility of parole for a nonviolent felony. Moreover, we noted that for purposes of an Eighth Amendment analysis, the United States Supreme Court engaged in a limited proportionality review: “The court first explained the manner in which an appellate tribunal is to assess the gravity of an offense for purposes of an Eighth Amendment analysis. ‘In weighing the gravity of [the defendant’s] offense, we must place on the scales not only his current felony, but also his

long history of felony recidivism.”” (*In re Coley, supra*, 187 Cal.App.4th at p. 143, quoting *Ewing v. California* (2003) 538 U.S. 11, 29; see also *Rummel v. Estelle* (1980) 445 U.S. 263, 274 & fn. 11.)

The same is true of defendant in this case. Defendant has a criminal history dating back to three juvenile delinquency charges culminating in a six-year camp program placement. Defendant’s adult history began in 1991 with numerous drug-related arrests, grants of probation and county jail sentences between 1991 and 1993. In 1994 he was convicted of indecent exposure. In February 1995, defendant’s probation related to a possessing a weapon in prison conviction was revoked and he was sentenced to three years in state prison. Also in February 1995, defendant was sentenced to five years in state prison for robbery. While an inmate at Pelican Bay state prison in 1998, defendant was convicted of assault with a deadly weapon and sentenced to two years in state prison. In 2004, defendant was convicted of robbery and sentenced to state prison for five years plus a five-year section 667, subdivision (a) enhancement. In 2005, defendant was convicted of battery of a custodial officer in the Los Angeles County Jail. Given defendant’s prior history and the facts related both to him and his offenses, no constitutional violation has occurred by reason of his 25 years to life sentence. (*Rummel v. Estelle, supra*, 445 U.S. at p. 268; *Spencer v. Texas* (1967) 385 U.S. 554, 560; *In re Coley, supra*, 187 Cal.App.4th at p. 147; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510-1517; *People v. Cooper* (1996) 43 Cal.App.4th 815, 820-828; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134-1137.)

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J.

MOSK, J.